Supreme Court, U.S.
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No. 01-383

In The

Supreme Court of the United States

EDDY POTASH, INC.,

Petitioner,

vs.

JEANNE HARRISON,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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PETITION FOR WRIT OF CERTIORARI

Respondent Jeanne Harrison respectfully submits the following Brief in Opposition to the Petition for a Writ of Certiorari of Petitioner Eddy Potash, Inc. ("EPI") pursuant to Sup.Ct.R. 15.

I. RESPONSE TO EPI'S STATEMENT OF THE CASE.

Ms. Harrison does not concur in EPI's statement of the facts. EPI presents as facts a very selective version of the evidence. These "facts" include matters that must have been resolved against EPI in order for the jury to have returned a verdict in favor of Ms. Harrison. With respect to the general facts of this case, Ms. Harrison refers the Court to the statement of the facts contained in the opinion of the Tenth Circuit below, which more accurately summarizes the facts of this matter. *See Harrison v. Eddy Potash, Inc.*, 248 F.3d 1014, 1016-18 (10th Cir. 2001); Petition for a Writ of Certiorari ("Petition"), App. A at 2a-8a.

EPI also makes misstatements of facts specific to the issues that would be before the Court if EPI's Petition for a Writ of Certiorari were granted. Some of EPI's alternative statements of the question presented assume that it acted reasonably to prevent harassment from occurring. As discussed below, EPI did not preserve these questions for review. However, to the extent that the Court might consider these issues, EPI did not act reasonably with respect to the dissemination of its sexual harassment policy, and EPI misstates the facts respecting this matter. While there was conflicting evidence at trial, the jury

found in favor of Ms. Harrison, and it must be assumed therefore that the jury believed Ms. Harrison's version of the facts.

Thus, the facts are as follows: Ms. Harrison was never given a copy of EPI's sexual harassment policy. When Ms. Harrison went to work for EPI, she was given a folder with various materials in it. However, EPI did not include a copy of the sexual harassment policy in the folder.

Further, EPI did not post, or did not maintain, the sexual harassment policy on the two bulletin boards where Ms. Harrison was most likely to see it. When Ms. Harrison went to work each day at EPI, she would go to the women's changing room to change into her work clothes. There was a bulletin board in the women's changing room. EPI's sexual harassment policy was not posted on that bulletin board during the time that Ms. Harrison worked for EPI. After the miners were transported underground, they would gather in the shifter's (supervisor's) office to get their instructions for the day. There was a bulletin board in the shifter's office. The sexual harassment policy was not on that bulletin board, either.

EPI also never verbally informed Ms. Harrison about its sexual harassment policy. When Ms. Harrison went to work for EPI in 1992, she was required to participate in an orientation program. EPI's policy against sexual harassment was not discussed in the orientation program. EPI held regular meetings for the miners called "safety huddles." EPI never discussed its policy against sexual harassment in the safety huddles. Robert L. Brown, Ms.

Harrison's supervisor and the person who sexually assaulted her, testified that he never spoke to his crew about the policy after it was issued in 1989. Kenny Leivo, EPI's human resources manager, testified that beyond posting, EPI made no efforts to educate its employees about the policy after the issuance of the policy in 1989 through the time of the harassment of Jeanne Harrison in 1993, a period of almost four years.

EPI also never trained its supervisors about sexual harassment or instructed them to review the policy with the employees periodically. Robert L. Brown testified that after the sexual harassment policy was issued in 1989, he heard nothing more from EPI about the policy or about sexual harassment. He never had any classes on the subject and never had any meetings with his superiors in which they discussed sexual harassment.

Finally, EPI took no special steps to ensure that women were aware of EPI's sexual harassment policy, even though it would have been a simple matter to do so, since only two women worked in the mine at the time Ms. Harrison returned to work for EPI in 1992.

EPI also makes several other misleading statements pertinent to dissemination and knowledge of the illegality of sexual harassment. EPI states that Ms. Harrison discovered the policy on a bulletin board in an area of the mine where she did not usually work, but fails to reveal that this only occurred after four of the five sexual assaults had already occurred. EPI also omits the fact that the reason Ms. Harrison did not read the policy at that time was because she assumed that there would be a copy of the policy in her orientation materials. When she got

home and looked, however, the policy was not there. EPI further states that Ms. Harrison knew that sexual harassment was illegal. Her testimony was only that she knew in a vague, general sense that harassment was probably illegal. Her knowledge was simply "common sense."

II. RESPONSE TO EPI'S REASONS FOR GRANTING THE WRIT.

A. EPI HAS NOT PRESERVED ISSUES FOR REVIEW.

The instant case involves the affirmative defense to employer liability under Title VII created by the Court in the cases of *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998). The Court created the following rule of employer liability under Title VII:

> An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence, see Fed. Rule Civ. Proc. 8(c). The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities

> provided by the employer or to avoid harm otherwise.

Ellerth, 524 U.S. at 765, 118 S.Ct. at 2270; *Faragher*, 524 U.S. at 807, 118 S.Ct. at 2292-93.

However, it is not clear what question EPI is raising in its Petition for a Writ of Certiorari respecting this defense. The question presented is stated in abstract, general terms as "[s]hould an employer be vicariously liable for supervisor sexual harassment" under certain specified circumstances. EPI's question presented does not state the question in relation to the circumstances of the case as required by Sup.Ct.R. 14.1(a) and does not specify the error that it alleges was made below. However, in its summary of the proceedings, EPI notes that it offered the following instruction:

> You are instructed that if you find that Plaintiff Jeanne Harrison promptly complained of Robert L. Brown's harassing conduct and that Eddy Potash promptly responded, disciplined appropriately, and stopped the harassment, then you should find for Eddy Potash.

EPI's Requested Instruction No. 7, Petition at 9 and App. E, p. 33a. The district court refused to give this instruction. Ms. Harrison assumes that EPI is complaining of the district court's refusal of Requested Instruction No. 7.

EPI's statement of the question presented is further confusing in that it sets forth alternative formulations of the question. Some versions of the question presented have an element of reasonable care by the employer to prevent harassment from occurring in the first instance and some focus solely on the employer's response once a

complaint of harassment has been received. To the extent that EPI is asking the Court to create a rule of law that an employer is absolved of liability, regardless of the reasonableness of the employee's conduct, if it (1) took reasonable care to prevent harassment and (2) corrected promptly any sexually harassing behavior, this issue was not preserved for review. EPI's Requested Instruction No. 7 says nothing about preventing harassment. EPI's Requested Instruction No. 7 would absolve an employer of liability based solely on its prompt remedial actions after the harassment has occurred, even if the employer had done nothing to prevent the harassment from occurring in the first instance. The only issue preserved for review is whether the district court erred in failing to instruct the jury that an employer is absolved of liability based solely on its prompt response to an employee's harassment complaint, as set forth in EPI's Requested Instruction No. 7. EPI's alternative formulations of the question presented in ¶¶ 1(b) and 1(d) were not preserved for review.

B. THERE IS NO IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

EPI states that it is "arguable" that the Court's decisions in *Ellerth* and *Faragher* did not address the issue of whether an employer is relieved of liability if it meets only the requirements of the first prong of the affirmative defense created by those cases. By creating an affirmative defense composed of two requirements, including a requirement that the employee unreasonably failed to take advantage of corrective or preventive opportunities,

the Court implicitly rejected the contention that meeting one requirement is, by itself, sufficient. *See Indest v. Freeman Decorating, Inc.*, 168 F.3d 795, 800-801 (5th Cir. 1999) (opinion of Judge Wiener).

EPI further argues that the Court should grant its Petition because even if its argument was disposed of by the decisions in *Ellerth* and *Faragher,* the application of the affirmative defense created by the Court does not promote the announced goals of the Court in those cases. This argument does not provide a basis for granting a petition for a writ of certiorari under the bases specified in Sup.Ct.R. 10. Moreover, EPI is wrong in concluding that its proposed modification of the affirmative defense would more successfully promote the goals stated by the Court.

The Court's announced purpose in creating the affirmative defense to the vicarious liability of employers under Title VII was two-fold. The defense was designed to "accommodate . . . Title VII's equally basic policies of encouraging forethought by employers and saving action by objecting employees. . . . " *Ellerth,* 524 U.S. at 764, 118 S.Ct. at 2270; *Faragher,* 118 S.Ct. 2292, 524 U.S. at 807. Thus, the purpose of the defense was not just to create an incentive to employers to take action to prevent and promptly remedy sexual harassment, but also to provide an incentive to victims of harassment to act promptly to prevent or limit harassment. In *Faragher,* the Court explained the reason for requiring the second prong of the defense:

> The requirement to show that the employee has failed in a coordinate duty to avoid or mitigate

> harm reflects an equally obvious policy imported from the general theory of damages, that a victim has a duty "to use such means as are reasonable under the circumstances to avoid or minimize the damages" that result from violations of the statute. *Ford Motor Co.* v. *EEOC*, 458 U. S. 219, 231, n. 15 (1982) (quoting C. McCormick, Law of Damages 127 (1935) (internal quotation marks omitted). An employer may, for example, have provided a proven, effective mechanism for reporting and resolving complaints of sexual harassment, available to the employee without undue risk or expense. If the plaintiff unreasonably failed to avail herself of the employer's preventive or remedial apparatus, she should not recover damages that could have been avoided if she had done so.

Faragher, 524 U.S. at 806-807, 118 S.Ct. at 2292.

The affirmative defense fashioned by the Court thus recognizes that the prevention of harassment is a two-way street. Harassment can be prevented or limited both by action of the employer and by action of the employee. EPI's proposed alternative would place the entire incentive and burden of preventing harassment on the employer and would eliminate any incentive for the employee to act promptly to prevent or stop harassment. EPI's proposed modification of the defense would thus undermine one of the policies of Title VII.

Further, under the formulation of the defense that was preserved for review, the only factor to be considered is whether the employer promptly responded to the harassment and stopped it. Under this defense, action to prevent harassment from occurring in the first place

would be irrelevant, and there would be no incentive for the employer to take such actions. Thus, EPI's proposed alternative formulation of the affirmative defense would also defeat Title VII's goal of "encouraging forethought by employers." Ms. Harrison submits that the Court's two-part defense advances Title VII's deterrent objectives, while EPI's proffered alternative destroys incentives for both the employer and the employee to take deterrent action.

Moreover, even if the Court were to consider EPI's formulation of the question presented that includes reasonable action by the employer to prevent harassment, EPI's arguments do not stand up to scrutiny. EPI argues that if the affirmative defense is defeated when the employee acts reasonably, there is a disincentive to the employer to take actions that would encourage the employee to act reasonably and promptly report harassment. However, there is no evidence in the record that the affirmative defense as formulated by the Court has in fact acted as a disincentive to employers to do all they can to prevent harassment or that it has caused employers to forego such measures as harassment training or hotlines. It is speculation on EPI's part that this is how employers will respond to the affirmative defense. There is ample reason to believe that the defense will not act as a disincentive for employers to do everything that they can to prevent harassment.

First, the promulgation and posting of a sexual harassment policy are not the only matters that a finder of fact will look to in determining whether the employer has acted reasonably to prevent harassment. If the employer did not give copies of the policy to its

employees, did not hold meetings to inform its employees about its sexual harassment policy, did not train its supervisors about sexual harassment, or provided a less convenient means of reporting harassment, these facts will be presented to the jury. Expert witnesses may be employed to testify as to what constitutes reasonable steps to prevent harassment and as to the steps similar employers take to prevent harassment. If the employer's actions to prevent harassment do not measure up, such an opinion may be offered to the finder of fact. If an employer actually eliminates anti-harassment measures in the wake of *Ellerth* and *Faragher* in order to trap employee-victims into not promptly reporting harassment, this will certainly be discovered and pointed out at trial and would be damaging evidence against the employer. By failing to take and maintain all available steps to prevent harassment, the employer thus runs the risk that it will be found to have acted unreasonably under the first prong of the affirmative defense. A prudent employer will take all reasonable steps to insure that it meets this first prong.

Second, it is likely that a prudent employer will view its goal not as escaping from liability after it is sued, but as preventing lawsuits from occurring in the first place by preventing harassment. Employers do not want to be involved in lawsuits. Lawsuits are expensive even if the employer ultimately prevails, and they are also costly in terms of diverting time and effort from the purpose of the employer, to put out a product or service and earn a profit. Training will in some cases prevent potential harassers from harassing. Moreover, if victims report harassment or situations that they feel might develop into

harassment right away, the harassing activity may be nipped in the bud, before the harassment becomes sufficiently severe or pervasive such that the employee might want to sue the employer. Even if there is a basis for a lawsuit, prompt reporting encouraged by the employer might limit damages. Thus, logic suggests that a prudent employer would not cut back on measures designed to prevent harassment because of the affirmative defense crafted by the Court. The affirmative defense crafted by the Court will not undermine the deterrent goals of Title VII.

In sum, there is no important question of federal law that has not been, but should be, addressed by this Court; the defense proposed by EPI would undermine, not advance, the deterrent goals of Title VII; and the Court's affirmative defense should not cause employers to fail to take reasonable measures to prevent harassment. The Court should accordingly deny EPI's Petition.

C. THERE IS NO CONFLICT BETWEEN THE CIRCUITS.

EPI also argues that there is a conflict between the circuits as to the application of the *Ellerth/Faragher* affirmative defense. An examination of the cases cited by EPI reveals that no such conflict exists.

EPI cites a footnote in the case of *Watkins v. Professional Security Bureau, Limited,* 1999 U.S.App. LEXIS 29841, 1999 WL 1032614 (4th Cir. 1999), *cert. denied,* 529 U.S. 1108, 120 S.Ct. 1961, 146 L.Ed.2d 793 (2000), stating that it is inconceivable that an employer who promptly and adequately responds to an incident of harassment

would be held liable on the grounds that it cannot meet the literal terms of the second element of the affirmative defense. However, the court had already decided that the employer did meet the literal terms of the second element of the affirmative defense. The statement in the footnote is dicta. Because the statement in the footnote is not a holding of the court, there can be no conflict between this decision and the decisions of other circuit courts. Moreover, this is an unpublished decision. As a result, the case has little precedential value, even within the Fourth Circuit. *See* 4th Cir.R. 36(c) (court will not cite an unpublished disposition absent unusual circumstances, and citation by parties is disfavored).

EPI also cites *Indest v. Freeman Decorating, Inc.* In *Indest*, two opinions were published. First, there was an opinion authored by Judge Jones, 164 F.3d 258, *superceded*, 1999 U.S. App. LEXIS 3125 (5th Cir. 1999), which EPI characterizes as a "plurality" opinion. Second, Judge Wiener, who had concurred only in the result of Judge Jones's opinion, filed a separate opinion, 168 F.3d 795. The third judge, Judge Furgeson, did not join in either opinion, but simply concurred in the result. 168 F.3d at 796 and n. 1; 164 F.3d at 260. Thus, the allegedly conflicting decision of Judge Jones is not only not a plurality opinion, since it did not get any more votes than the opinion of Judge Weiner, but because it did not receive the votes of a majority of the panel, it does not constitute precedent in the Fifth Circuit. 168 F.3d at 796, n. 1. Because Judge Jones's decision is simply the opinion of one judge with no precedential value, it does not create a conflict with the decisions of other circuits.

EPI cites *Williams v. General Motors Corp.*, 187 F.3d 553 (6th Cir. 1999), but does not explain how this case creates a conflicting interpretation of the Court's affirmative defense. An examination of the case does not reveal any aberrations in its brief discussion of the Court's decisions in *Ellerth* and *Faragher*. *See Williams*, 187 F.3d at 560-61, 567. The case involved harassment by a co-worker, not a supervisor, so the court stated a different standard for determining employer liability. Moreover, the issues before the court in any case did not involve employer liability, but were whether there were fact issues for trial as to whether the harassment was severe or pervasive and whether the plaintiff subjectively perceived the work environment to be hostile. The issue of employer liability was not addressed by the court, 187 F.3d at 567, and the *Ellerth/Faragher* affirmative defense was not applied.

Finally, EPI cites a statement by Judge Barkett in his specially concurring opinion in *Coates v. Sundor Brands, Inc.*, 164 F.3d 1361, 1369 (11th Cir. 1999). Again, this is simply the statement of one judge, not a holding of the court. The statement cannot accordingly create a conflict with the opinions of other circuit courts of appeal. Further, Judge Barkett was not discussing whether the second prong of the Court's affirmative defense should be required when both the employer and the employee behave reasonably, but was discussing a supervisor's obligations to remedy co-worker harassment of which the supervisor has knowledge. Judge Barkett's omission of the second prong of the affirmative defense from his discussion in that context cannot reasonably be understood as disapproval of the second prong in the case of supervisor harassment.

EPI attempts to create the appearance of confusion and discord in the decisions of the circuit courts of appeal as to the application of the Court's affirmative defense where both the employer and the employee have acted reasonably. An examination of the cases cited by EPI, however, demonstrate that there is no conflict among the circuit courts of appeal on this issue. There is thus no basis for granting EPI's Petition.

III. CONCLUSION.

For the reasons stated herein, Respondent Jeanne Harrison prays this Court that EPI's Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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